

*What Every Member of the
Trade Community Should Know About:*

Writing Instruments of Heading 9606, HTSUSA



AN INFORMED COMPLIANCE PUBLICATION

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U.S. CUSTOMS and BORDER PROTECTION

NOTICE:

This publication is intended to provide guidance and information to the trade community. It reflects the position on or interpretation of the applicable laws or regulations by U.S. Customs and Border Protection (CBP) as of the date of publication, which is shown on the front cover. It does not in any way replace or supersede those laws or regulations. Only the latest official version of the laws or regulations is authoritative.

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PREFACE

On December 8, 1993, Title VI of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), also known as the Customs Modernization or “Mod” Act, became effective. These provisions amended many sections of the Tariff Act of 1930 and related laws.

Two new concepts that emerge from the Mod Act are “***informed compliance***” and “***shared responsibility***,” which are premised on the idea that in order to maximize voluntary compliance with laws and regulations of U.S. Customs and Border Protection, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the Mod Act imposes a greater obligation on CBP to provide the public with improved information concerning the trade community’s rights and responsibilities under customs regulations and related laws. In addition, both the trade and U.S. Customs and Border Protection share responsibility for carrying out these requirements. For example, under Section 484 of the Tariff Act, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and determine the value of imported merchandise and to provide any other information necessary to enable U.S. Customs and Border Protection to properly assess duties, collect accurate statistics, and determine whether other applicable legal requirements, if any, have been met. CBP is then responsible for fixing the final classification and value of the merchandise. An importer of record’s failure to exercise reasonable care could delay release of the merchandise and, in some cases, could result in the imposition of penalties.

The Office of Regulations and Rulings (ORR) has been given a major role in meeting the informed compliance responsibilities of U.S. Customs and Border Protection. In order to provide information to the public, CBP has issued a series of informed compliance publications, and videos, on new or revised requirements, regulations or procedures, and a variety of classification and valuation issues.

This publication, prepared by the National Commodity Specialist Division, ORR, is writing implements of Heading 9609, HTS. “Writing Instruments of Heading 9606, HTSUSA” provides guidance regarding the classification of imported merchandise. We sincerely hope that this material, together with seminars and increased access to rulings of U.S. Customs and Border Protection, will help the trade community to improve voluntary compliance with customs laws and to understand the relevant administrative processes.

The material in this publication is provided for general information purposes only. Because many complicated factors can be involved in customs issues, an importer may wish to obtain a ruling under Regulations of U.S. Customs and Border Protection, 19 C.F.R. Part 177, or to obtain advice from an expert who specializes in customs matters, for example, a licensed customs broker, attorney or consultant.

Comments and suggestions are welcomed and should be addressed to the Assistant Commissioner at the Office of Regulations and Rulings, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue, NW, (Mint Annex), Washington, D.C. 20229.

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INTRODUCTION

This publication addresses the classification of non-mechanical pencils, which has been problematic for some importers. Section XX, heading 9609, of the HTSUS provides for certain writing instruments.

9609 Pencils (other than those pencils of heading 9608), crayons, pencil leads, pastels, drawing charcoals, writing or drawing chalks and tailors' chalks:

9609.10.0000 Pencils and crayons, with leads encased in a rigid sheath

*9609.20 Pencil leads, black or colored:
9609.20.2000 Not over 1.5 mm in maximum cross-sectional dimension*

9609.20.4000 Over 1.5 mm in maximum cross-sectional dimension

*9609.90 Other:
9609.90.4000 Tailors' chalks
9609.90.8000 Other*

The cross-sectional dimension of the lead is the transverse measurement, the diameter if it is round, the diagonal if it is square, etc.

This heading does not include every item described as a pencil, only pencils used for writing or drawing. For example, Note 1(a) to this chapter excludes pencils for cosmetic or toilet uses, which are classified in chapter 33. It also does not include mechanical pencils, which are provided for in Heading 9608.

The Explanatory Notes divide the heading into two classes of writing instruments, viz., (1) pencils and crayons encased in a rigid sheath, and (2) other drawing and writing articles which either have no cover, or are wrapped in a simple band of paper. Therefore, children's crayons, which are commonly wrapped in paper, are classifiable in subheading 9609.90.8000, and not in subheading 9609.10.0000.

HOW PENCILS ARE MADE

The writing core used in pencils has varied throughout the years. Historically, several materials were called "lead," such as bismuth, antimony, graphite and lead itself. Each of these has been used in pencils, and so we still call the core of a pencil a pencil lead. The French invented the modern pencil lead, a mixture of graphite and clay, in 1795. Pencil leads, imported by themselves, are classifiable in headings 9609.20.2000 and 9609.20.4000, HTS, depending on their maximum cross sectional dimension. Since each of these materials feels slippery to the touch, pencil makers

have always had some method to wrap or sheathe the lead. Today, wood is the choice, and cedar is considered the best. Basswood is also frequently used.

The manufacturers cut slats of wood to size. A slat about 7 cm by 18.5 cm is enough to make 8 to 9 pencils. They cut grooves into the slats and glue a lead into each groove. They glue another slat on top to make a pencil slat or pencil sandwich. They then groove the slat on the outside on one side.

In HQ 956872 of May 8, 1995, Customs ruled that pencil sandwiches were classifiable as unfinished pencils in heading 9609.10.0000.

These pencil sandwiches are made of wooden slats, prepared from sawn or sliced lumber. They are cut to size and grooved on both sides. The multiple grooves on one side are cut to accommodate "lead" graphite writing cores, while the grooves on the outside are cut to facilitate subsequent processing. After the graphite cores are emplaced on one grooved slat, the slat is glued to another similarly-sized slat. . . .

The imported pencil sandwiches are more than mere slats. The pencil sandwiches are already dedicated for use as pencils at the time of importation. By the time the pencil sandwiches are formed, every detail concerning the finished pencils has been predetermined; the number of pencils has been fixed (by the number of writing cores placed in the slat) and the length and diameter of each pencil is known. To produce usable pencils, the sandwich is cut to length in a milling machine. The pencil sandwiches have been worked such that they are fit only for final milling to remove excess wood and yield the finished pencils.

In sum, the graphite cores embedded in the wood slats impart the essential character of pencils. Accordingly, we find that the imported pencil sandwiches are pencils in unfinished form. The pencil sandwiches are properly classified under subheading 9609.10.0000, HTSUS.

Individual raw pencils are cut out of the slat. From that point the processing varies depending on the final product. A standard pencil will be further shaped into a hexagon, painted and lacquered. An aluminum ferrule and eraser will be attached. The pencil may be decorated with colorful foiling, advertising logos, or other attractive designs.

HOW TO PAY DUTY AND PROVIDE STATISTICAL INFORMATION

Pencils are dutiable at a compound rate. In other words, a specific rate of duty and an *ad valorem* rate of duty are both to be collected. The specific rate is collected per gross of pencils imported, and the *ad valorem* rate on the appraised value. The statistical quantity required is the gross of pencils imported.

One gross equals 12 dozen, or 144, pencils. The misdeclaration of the quantity is the most prevalent error in the entry of pencils. For example, a shipment of 12,000 pencils (equaling 83 gross, rounded off) or a shipment of 12,000 *dozen* pencils (equaling 1,000 gross) might be declared in error as 12,000 in the statistical quantity. The first is an overstatement of 14,400%! A single mistake can affect the statistics severely.

Sets of pencils containing other articles are another difficulty. Headquarters settled the issue in HQ 088521 of May 13, 1991. Although the ruling was on crayons, it is equally applicable to pencils.

The articles in question are ten erasable color stick crayons, a crayon eraser and a crayon sharpener imported together in one box. HQ 086812 determined that these items formed "goods put up in a set for retail sale" under General Rule of Interpretation ("GRI") 3(b), Harmonized Tariff Schedule of the United States Annotated ("HTSUSA"). As a set within the meaning of GRI 3(b), the twelve items are classifiable according to the article that imparts the set's essential character. HQ 086812 concluded that the crayons provided the set's essential character. The set was classified under heading 9609, HTSUSA, the heading which provides for, *inter alia*, crayons. The proper classification for the set was found to be subheading 9609.90.80, HTSUSA, as "...crayons... Other...Other..." The rate of duty to be applied is 5.5 cents/gross plus 3.4 percent *ad valorem*.¹

The tariff rate for subheading 9609.90.80 requires a rate of 5.5 cents/gross to be applied to articles classified within that provision. The term "gross" when used to refer to a numerical quantity means "[a] group of 144 articles or 12 dozen items." *Webster's II New Riverside University Dictionary*, p. 550 (1984). It is the opinion of this office that the 144 articles or 12 dozen items on which 5.5 cents is to be assessed is the number of articles in each set. We base this decision on the following reasons.

First, when an article is determined to be a set under the terms of the HTSUSA, all articles in the set are charged the same duty. The duty applied is the rate attached to the article within the set that imparts the set's essential character. In this instance, the crayons impart the set's essential character. The set is classified under the provision for crayons. All the articles within the set are treated for classification purposes as if they are crayons. In a situation without a compound rate of duty, the *ad valorem* rate of duty is assessed on the total value of all the articles within the set. It follows that if all articles are classified as crayons and the *ad valorem* rate assessed is applied to the value of all the articles as if they

¹ Subheading 9609.90.80, HTSUS (2000) Column 1 rate of duty is 'Free.' However, the principle continues to apply to such headings as 9608.10, 9608.20, 9609.10, et al

were crayons, then all the articles within the set should also be assessed the cents/gross rate of duty as if they were crayons.

Additionally, the Customs Court previously addressed this issue. In *Import Associates of America and Fraser's, Inc. v. United States*, [60 Cust. Ct. 491, C.D. 3439 (1968)], the court addressed the classification of sets of stainless steel flatware which consisted of knives and forks, or knives, forks and spoons. This case, although decided under the prior Tariff Schedules of the United States ("TSUS"), is applicable in this instance because flatware articles were assessed compound rates of duty. The court held that a "specific duty is to be assessed on each article in the set." See also *Swissedent International v. United States*, [40 Cust. Ct. 95, C.D. 1965 (1958)], *Arnart Imports, Inc. v. United States*, [54 C.C.P.A. 34, C.D. 2550, (1967)].

A compound rate of duty is to be applied to every article within a set. In the present instance there are twelve articles within each set. One dozen sets would equal one gross. Therefore, the 5.5 cents/gross is applicable to one dozen of the crayon color stick sets.

DUMPING OF PENCILS

At present, certain pencils from China are subject to antidumping duties. Antidumping Order A-570-827, issued December 28, 1994 (59 FR 66909), describes the merchandise as "certain cased pencils of any shape or dimension which are writing and/or drawing instruments that feature cores of graphite or other materials encased in wood and/or man-made materials, whether or not decorated and whether or not tipped (e.g., with erasers, etc.) in any fashion, and either sharpened or unsharpened."

The regulations, standards and procedures used by the Department of Commerce to determine the scope of an antidumping order are not the same as those employed by Customs in classifying merchandise. Commerce specifically reserves the ultimate authority to clarify the scope of antidumping duty orders. It may consider the decisions of Customs, but it is not obligated to follow them. Two recent final scope rulings on pencils from China demonstrate these principles.

Case 1. On July 15, 1994, Customs had issued ruling NY 899587, regarding the tariff classification of a "Naturally Pretty" dress-up vanity set. The vanity set contained a shoulder bag, a comb, a brush, a mirror, sunglasses, an address book, a pencil pouch, a pad and two pencils from China. Although called a set, Customs had held that it was not a set under GRI 3. We ruled each item separately classifiable. The pencils were wood-cased pencils, 3 inches in length, of the type described in the dumping order.

The importer, Creative Designs International, requested that the pencils in this set be excluded from the antidumping order. Commerce agreed.

The regulations for the determination of the scope of an antidumping order are found in 19 CFR Section 351.225. In pertinent part, these are:

- (1) The descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the Commission.
- (2) When the above criteria are not dispositive, the Secretary will further consider:
 - (i) The physical characteristics of the product;
 - (ii) The expectations of the ultimate purchasers;
 - (iii) The ultimate use of the product;
 - (iv) The channels of trade in which the product is sold; and
 - (v) The manner in which the product is advertised and displayed.

Since the original order did not address a “mixed media” set, 19 CFR 351.225(1) was not dispositive. In its analysis of the product, Commerce stressed that the merchandise subject to the scope request was the vanity set and not the two pencils that were minor components of that set. Therefore, the factors of cost and physical characteristics should be directed at the set, rather than the pencils contained therein.

Once we accept this viewpoint, the rest of the analysis is simple to follow. While the ultimate purchaser will use the pencils as writing instruments, such purchaser would not buy the set solely or principally to acquire pencils. Since the item under consideration was a vanity set, its use was for young girls’ role playing, not writing or drawing.

Commerce found that both cased pencils and toy sets were sold through mass merchandisers, and so this category was not determinative. But, finally, the vanity set was bought, sold and advertised as a dress-up role-play set, rather than displayed in office or stationery stores. Therefore, Commerce concluded that the pencils within this type of mixed media set were not subject to antidumping duties, although Customs requires that they be entered separately for tariff purposes.

Case 2. On April 13, 1993, Customs had issued ruling HQ 951918 regarding the tariff classification of a non-sharpening pencil. The pencil consisted of a plastic barrel approximately five inches long, tapered at one end and capped at the other. The barrel contained a series of eleven pencil points of lead partially encased in a tapered plastic cap with ridges. The plastic encasing each piece of lead had a cavity at the end opposite the lead so that it can receive another one of the lead pencil points.

The pencil had no mechanical action. It operated by removing the worn point from the writing end of the barrel, shaking the barrel to bring the next point forward and by inserting the used point in the opening in the barrel's cap. HQ held that the pencil was classifiable under heading 9609.10.0000. Since the pencil fit the plain language of the antidumping order, Customs collected antidumping duties.

An importer, Nadel Trading Corporation, requested that such pencils be excluded from the antidumping order. Commerce agreed.

In this case, in an effort to separate this pencil (known as the “Bensia”) from those in the order, Nadel had described it as a “mechanical or quasi-mechanical” pencil. This argument was rejected since the pencil has no mechanical feature of any kind. However, Commerce relied on an analysis of the original petition, the initial investigation and determinations of the Department and the ITC. These had addressed pencils as disposable instruments requiring sharpening to renew the writing core. The Bensia pencil was found to be not of the same class or kind of merchandise as that covered by the scope of the order.

Customs does not have the authority to rule on the scope of a dumping order. It is obvious that in neither of the above cases would Customs have had sufficient information to come to the appropriate conclusion.

PENCILS WITH TOPPERS: CLASSIFICATION AND COUNTRY OF ORIGIN

Three NY rulings addressed pencils topped with decorative figurines rather than erasers. The rulings were NY A80855 of March 25, 1996, NY A84784 of July 2, 1996, and NY D82043 of September 10, 1998. In each case, Customs held that the pencil with an attached topper was a pencil classified in subheading 9609.10.0000, per GRI 1. In Customs’ opinion, a pencil with a topper need not be viewed as a composite article, consisting of separate components. The items are known and sold as pencils. Their use is the same as any other pencil.

Heading 9609 provides *eo nomine* for pencils. An *eo nomine* provision covers all forms of the article. Nothing would exclude decorated pencils from this heading. The only physical restriction in the heading is that they must be encased in a rigid sheath, as these pencils are. Since they fall within the heading, there is no reason to resort to any GRI other than GRI 1.

The case of *U.S. v. Gibson-Thomsen Co., Inc.*, 27 C.C.P.A. 267 (C.A.D. 98) (1940), provides that an article used in manufacture which results in an article having a name, character or use differing from that of the constituent article will be considered substantially transformed. Regarding country of origin, it is Customs’ opinion that the country of origin is the country in which the pencil itself is made. In HQ 956872, Customs ruled that a pencil slat was an unfinished pencil classified in subheading 9609.10.0000. Converting a pencil slat into a finished pencil is a certainly more complex process than gluing on a topper. If, for example, a pencil of Chinese origin is imported into Taiwan for finishing, it enters that country as a pencil, and leaves as a pencil. Enhancing its value does not change its name, character and use. It has not been substantially transformed, merely decorated.

ADDITIONAL INFORMATION

The Internet

The home page of U.S. Customs and Border Protection on the Internet's World Wide Web, provides the trade community with current, relevant information regarding CBP operations and items of special interest. The site posts information -- which includes proposed regulations, news releases, publications and notices, etc. -- that can be searched, read on-line, printed or downloaded to your personal computer. The web site was established as a trade-friendly mechanism to assist the importing and exporting community. The web site also links to the home pages of many other agencies whose importing or exporting regulations that U.S. Customs and Border Protection helps to enforce. The web site also contains a wealth of information of interest to a broader public than the trade community. For instance, on June 20, 2001, CBP launched the "Know Before You Go" publication and traveler awareness campaign designed to help educate international travelers.

The web address of U.S. Customs and Border Protection is <http://www.cbp.gov>

Customs Regulations

The current edition of *Customs Regulations of the United States* is a loose-leaf, subscription publication available from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402; telephone (202) 512-1800. A bound, 2003 edition of Title 19, *Code of Federal Regulations*, which incorporates all changes to the Regulations as of April 1, 2003, is also available for sale from the same address. All proposed and final regulations are published in the *Federal Register*, which is published daily by the Office of the Federal Register, National Archives and Records Administration, and distributed by the Superintendent of Documents. Information about on-line access to the *Federal Register* may be obtained by calling (202) 512-1530 between 7 a.m. and 5 p.m. Eastern time. These notices are also published in the weekly *Customs Bulletin* described below.

Customs Bulletin

The *Customs Bulletin and Decisions* ("Customs Bulletin") is a weekly publication that contains decisions, rulings, regulatory proposals, notices and other information of interest to the trade community. It also contains decisions issued by the U.S. Court of International Trade, as well as customs-related decisions of the U.S. Court of Appeals for the Federal Circuit. Each year, the Government Printing Office publishes bound volumes of the *Customs Bulletin*. Subscriptions may be purchased from the Superintendent of Documents at the address and phone number listed above.

Importing Into the United States

This publication provides an overview of the importing process and contains general information about import requirements. The February 2002 edition of *Importing Into the United States* contains much new and revised material brought about pursuant to the Customs Modernization Act ("Mod Act"). The Mod Act has fundamentally altered the relationship between importers and U.S. Customs and Border Protection by shifting to the importer the legal responsibility for declaring the value, classification, and rate of duty applicable to entered merchandise.

The February 2002 edition contains a section entitled "Informed Compliance." A key component of informed compliance is the shared responsibility between U.S. Customs and Border Protection and the import community, wherein CBP communicates its requirements to the importer, and the importer, in turn, uses reasonable care to assure that CBP is provided accurate and timely data pertaining to his or her importation.

Single copies may be obtained from local offices of U.S. Customs and Border Protection, or from the Office of Public Affairs, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue NW, Washington, DC 20229. An on-line version is available at the CBP web site. *Importing Into the United States* is also available for sale, in single copies or bulk orders, from the Superintendent of Documents by calling (202) 512-1800, or by mail from the Superintendent of Documents, Government Printing Office, P.O. Box 371954, Pittsburgh, PA 15250-7054.

Informed Compliance Publications

U.S. Customs and Border Protection has prepared a number of Informed Compliance publications in the "*What Every Member of the Trade Community Should Know About:...*" series. Check the Internet web site <http://www.cbp.gov> for current publications.

Value Publications

Customs Valuation under the Trade Agreements Act of 1979 is a 96-page book containing a detailed narrative description of the customs valuation system, the customs valuation title of the Trade Agreements Act (§402 of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979 (19 U.S.C. §1401a)), the Statement of Administrative Action which was sent to the U.S. Congress in conjunction with the TAA, regulations (19 C.F.R. §§152.000-152.108) implementing the valuation system (a few sections of the regulations have been amended subsequent to the publication of the book) and questions and answers concerning the valuation system. A copy may be obtained from U.S. Customs and Border Protection, Office of Regulations and Rulings, Value Branch, 1300 Pennsylvania Avenue, NW, (Mint Annex), Washington, D.C. 20229.

Customs Valuation Encyclopedia (with updates) is comprised of relevant statutory provisions, CBP Regulations implementing the statute, portions of the Customs Valuation Code, judicial precedent, and administrative rulings involving application of valuation law. A copy may be purchased for a nominal charge from the Superintendent of Documents, Government Printing Office, P.O. Box 371954, Pittsburgh, PA 15250-7054. This publication is also available on the Internet web site of U.S. Customs and Border Protection.

The information provided in this publication is for general information purposes only. Recognizing that many complicated factors may be involved in customs issues, an importer may wish to obtain a ruling under CBP Regulations, 19 C.F.R. Part 177, or obtain advice from an expert (such as a licensed Customs Broker, attorney or consultant) who specializes in customs matters. Reliance solely on the general information in this pamphlet may not be considered reasonable care.

Additional information may also be obtained from U.S. Customs and Border Protection ports of entry. Please consult your telephone directory for an office near you. The listing will be found under U.S. Government, Department of Homeland Security.

“Your Comments are Important”

The Small Business and Regulatory Enforcement Ombudsman and 10 regional Fairness Boards were established to receive comments from small businesses about Federal agency enforcement activities and rate each agency’s responsiveness to small business. If you wish to comment on the enforcement actions of U.S. Customs and Border Protection, call 1-888-REG-FAIR (1-888-734-3247).

REPORT SMUGGLING 1-800-BE-ALERT OR 1-800-NO-DROGA



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